

1963

Mastic Tile Division of the Ruberoid Company v. Acme Distributing Co. et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

AUG 30 1963

MASTIC TILE DIVISION OF
THE RUBEROID COMPANY, a
corporation,

Plaintiff and Respondent,

vs.

ACME DISTRIBUTING COM-
PANY, a corporation, W. N. BEES-
LEY, SR., and SCOTT L. BEESLEY
Defendants and Appellants.

Clerk, Supreme Court, Utah

Case No. 9957

RESPONDENT'S BRIEF

Appeal from the District Court of Salt Lake County,
Utah

Honorable Stewart M. Hanson, *Judge*

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IN THE SUPREME COURT
of the
STATE OF UTAH

MASTIC TILE DIVISION OF
THE RUBEROID COMPANY, a
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Plaintiff and Respondent,

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PANY, a corporation, W. N. BEES-
LEY, SR., and SCOTT L. BEESLEY

Defendants and Appellants.

Case No. 9957

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This action was commenced December 14, 1962:

(1) To determine that there was due and owing from Acme Distributing Company to Respondent, the sum of \$82,270.49.

(2) To foreclose a Chattel Mortgage.

(3) To collect all accounts receivable assigned to Respondent.

(4) For judgment for any deficiency remaining against Acme Distributing Company for the full amount of said deficiency and against the individual defendants

for the amount of said deficiency, but not to exceed the sum of \$21,979.73.

DISPOSITION IN LOWER COURT

The lower court on June 10, 1963, granted Summary Judgment in Respondent's favor for amounts found then due and owing, to-wit: \$21,979.73 against all Appellants and \$19,005.73 with interest in the amount of \$960.00 and attorney's fees in the amount of \$4,500.00 against Appellant, Acme Distributing Company.

RELIEF SOUGHT ON APPEAL

Appellants ask that the judgment be reversed and the matter tried on the merits.

STATEMENT OF FACTS

Appellant, Acme Distributing Company, for some years prior to the commencement of this law suit had been a distributor of the floor tile and related products of Respondent. Sometime during the first part of 1961, the controlling stock of Acme Distributing Company was transferred from W. N. Beesley, Jr., to his father, W. N. Beesley, Sr., one of the Appellants herein. At that time, Acme Distributing Company owed Respondent the sum of \$81,278.91 on open account, all of which was past due. Acme Distributing Company desired to continue its relationship with Respondent, but Respondent could not permit further extension of credit with such a large past due balance. After discussion and negotiation between the parties, certain documents were prepared and executed on March 10, 1961.

The basic agreement between the parties reads:

AGREEMENT

"THIS AGREEMENT made and entered into by and between ACME DISTRIBUTING COMPANY, a Utah corporation, hereinafter called "Acme," and MASTIC TILE DIVISION OF THE RUBEROID COMPANY, a New Jersey corporation, maintaining an office at 2340 East Artesia, Long Beach, California, hereafter called "Mastic,"

WITNESSETH:

WHEREAS, Acme is indebted to Mastic in the amount of \$81,278.91 and the same is past due, and

WHEREAS, Acme desires to continue as a distributor of products sold by Mastic and to obtain credit for its further purchases from Mastic,

NOW, THEREFORE, in consideration of the covenants herein set forth, it is agreed:

1. Acme agrees to execute and deliver to Mastic its promissory note in the amount of \$81,278.91 with

interest thereon at three (3%) per cent per annum, payable at the rate of \$2,000.00 or more per month commencing on or before April 25, 1961, and a like amount on or before the 25th day of each month thereafter until principal and interest are fully paid.

2. To secure the payment of said promissory note, Acme agrees:

(a) To execute and deliver to Mastic a chattel mortgage on all merchandise heretofore sold to Acme by Mastic and now held by Acme and on all merchandise hereafter sold to Acme by Mastic or the Ruberoid Company or any of its divisions or subsidiaries.

(b) To sell, assign and transfer to Mastic all of its accounts receivable now owned and all accounts receivable which it may hereafter own which represent products sold to it by Ruberoid Company, Mastic Tile Division of the Ruberoid Company and any other division or subsidiary of The Ruberoid Company.

3. Acme agrees to prepare and forward to Mastic on or before the 10th day of each month hereafter the following schedules in manner and form prescribed by Mastic:

(a) A schedule of all accounts receivable representing business done by Acme during the preceding month, together with a copy of each invoice or other evidence of indebtedness, each document to bear an executed assignment by Acme in manner and form prescribed by Mastic.

(b) A schedule of payments on accounts theretofore assigned to Mastic by Acme received during the preceding month.

4. From and after the 1st day of January, 1961, all purchases from Mastic by Acme shall be at two (2%) per cent discount if paid within sixty (60) days from the invoice date and net if paid thereafter, provided that all payments to Mastic shall be the net invoice amount, and if paid within the discount period, Mastic agrees to credit the discount to the unpaid balance of the promissory note mentioned above, provided further that all invoices shall be paid not later than seventy-five (75) days from invoice date.

5. All books and records of Acme shall be open to inspection by Mastic, their officers, agents or employees

at all reasonable times, and Acme Agrees at its expense to furnish to Mastic quarterly a balance sheet and profit and loss statement attested to by a certified public accountant not later than thirty (30) days after each quarter. Acme further agrees to furnish to Mastic a copy of its Federal Income Tax return duly certified to be such by the office of the District Director of Internal Revenue.

6. Mastic agrees not to notify any obligor of Acme of the assignment of its account provided Acme is not in default in any payment herein reserved (note or open account) or other covenant or condition of this agreement to be kept or performed by Acme.

7. It is agreed that all sales, rebates from Mastic to which Acme may hereafter become entitled, except merchandise returns and adjustments, shall be credited to the promissory note mentioned above.

8. In the event of default by Acme in the payment of any installment on said promissory note or on any item of open account or any other covenant or condition of this agreement to be kept or performed by Acme, all indebtedness owing to the Ruberoid Company, Mastic Tile Division of the Ruberoid Company or any other division or subsidiary of the Ruberoid Company shall immediately be due and payable.

9. In the event of default by Acme, Mastic may immediately proceed to collect the assigned accounts receivable of Acme and may as to each or any of such accounts compromise and settle the same without liability to Acme.

WITNESS the signatures of the Parties hereto this 10th day of March, 1961.

ACME DISTRIBUTING COMPANY, INC
By W. N. Beesley, Sr.

MASTIC TILE DIVISION OF THE
RUBEROID COMPANY
By O. A. Maggia
Secretary

(Acknowledgements omitted)

The promissory note mentioned in the agreement reads as follows:

"PROMISSORY NOTE

\$81,278.91

**Salt Lake City, Utah
March 10, 1961**

FOR A VALUABLE CONSIDERATION, receipt whereof is acknowledged, the undersigned, jointly and severally, promise to pay to the order of MASTIC TILE DIVISION OF THE RUBEROID COMPANY, a New Jersey corporation, with its office at 2340 East Artesia, Long Beach, California, the sum of EIGHTY ONE THOUSAND TWO HUNDRED SEVENTY-EIGHT DOLLARS AND NINETY-ONE CENTS (\$87,278.91), with interest thereon at the rate of three (3%) per cent per annum. This note is payable in installments as follows: TWO THOUSAND DOLLARS (\$2,000.00) or more on or before the 25th day of April, 1961, and TWO THOUSAND DOLLARS (\$2,000.00) or more on or before the 25th day of each month thereafter until principal and interest are fully paid.

In case of default in payment of any of said installments of principal and interest or any part thereof, it shall be optional with the legal holder of this note to declare the entire principal sum hereof due and payable, and proceedings may at once be instituted for the enforcement and collection of the same by law. If this note is placed with an attorney for collection or if suit be instituted for collection, then in either event, the undersigned agrees to pay reasonable attorney's fees.

The makers and endorsers of this note severally waive presentment for payment, demand, protest and notice of nonpayment thereof and all defenses on the ground of any extension of the time of payment that may be given by the holder or holders to them or either of them.

ACME DISTRIBUTING COMPANY, INC.
By W. N. Beesley, Sr
Its President"

The chattel mortgage mentioned in the agreement is part of the record (page 25) and will not be reproduced herein to conserve space. The portion of this instrument significant to this appeal is found on page 4 and reads:

"This chattel mortgage is given to secure the payment of a promissory note in the amount of \$81,278.91 made and executed by said mortgagor and payable and delivered to mortgagee at its office in Long Beach, California, together with any further and additional loans or advances which the mortgagee or holder hereof, shall make to the mortgagor."

"Mortgagor agrees to pay all costs and expenses in connection with the foreclosure hereof whether by advertisement or action, including reasonable attorney's fees."

Also executed on March 10, 1961, was a supplemental agreement between the parties which reads:

"SUPPLEMENTAL AGREEMENT

THIS AGREEMENT made and entered into by and between ACME Distributing Company, a Utah corporation, hereafter called "Acme" and MASTIC TILE DIVISION OF THE RUBEROID COMPANY, a New Jersey corporation, maintaining an office at 2340 East Artesia, Long Beach, California, hereafter called "Mastic."

WITNESSETH:

1. This agreement is supplemental to that certain agreement dated the 10th day of March, 1961, between the parties hereto and, except as modified herein, is in full force and effect.

2. It is agreed that so long as Acme shall not default in any payment reserved in said agreement of March 10, 1961, (note or open account) the amounts collected by Acme on its accounts receivable assigned to Mastic, may be used by Acme in its ordinary course of business for business purposes, but not otherwise. Payments to Acme on said assigned accounts shall be applied to the oldest item or charge on the account.

3. It is agreed that the first line of Paragraph 3 (a) of the agreement of March 10, 1961, is amended to read as follows:

'(a) A schedule of all assigned accounts receivable,'.

4. Mastic agrees that Acme may, in the ordinary course of business, sell those goods, wares and merchandise within the lien of the chattel mortgage mentioned in the agreement of March 10, 1961, so long as Acme is not in default in any payment reserved in said agreement or in any other term or condition therein.

WITNESS the signatures of the parties hereto this 10th day of March, 1961.

ACME DISTRIBUTING COMPANY, INC.

By W. N. Beesley, Sr.

MASTIC TILE DIVISION OF THE
RUBEROID COMPANY

By O. A. Maggia
Secretary"

(Acknowledgments omitted)

Appellants assert that this supplemental agreement was omitted from the pleadings and record in this case. It is readily seen that this supplemental agreement is not material to the issues of this case or this appeal, but merely provides certain mechanics relating to the trade accounts assigned and the merchandise covered by the chattel mortgage.

As further consideration and to induce Respondent to grant further credit to Acme and to continue the dealer relationship, Appellant, Acme, by separate instrument assigned to Respondent a debt in the amount of \$21,979.73 which was owed to it by its former controlling stockholder, W. N. Beesley, Jr. This debt had been assumed by the two individual Appellants. The assignment reads as follows:

"ASSIGNMENT

WHEREAS, there is due to Acme Distributing Company, Inc. TWENTY-ONE THOUSAND NINE HUNDRED SEVENTY NINE DOLLARS AND SEV-

ENTRY THREE CENTS (\$21,979.73) from W. N. Beesley, Jr., a former officer of Acme Distributing Company, Inc., which, for a valuable consideration, has heretofore been assumed and guaranteed, jointly and severally, by W. N. Beesley, Sr. and Scott Low Beesley.

NOW, THEREFORE, for a valuable consideration, receipt of which is acknowledged, Acme Distributing Company, Inc., does hereby sell, assign and transfer unto MASTIC TILE DIVISION OF THE RUBEROID COMPANY, a New Jersey corporation, the account or claim against said W. N. Beesley, Jr. in the amount set forth above.

It is agreed between Acme Distributing Company, Inc. and Mastic Tile Division of the Ruberoid Company, assignor and assignee respectively, that this assignment shall be a part of that certain agreement between them dated March 10, 1961.

Dated this 10th day of March, 1961.

ACME DISTRIBUTING COMPANY, INC.

By W. N. Beesley, Sr.

Its President

MASTIC TILE DIVISION OF THE
RUBEROID COMPANY

By O. A. Maggia

Its Secretary

The undersigned acknowledge that they are jointly and severally liable to Acme Distributing Company, Inc. in the amount of \$21,979.73 and consent to the foregoing Assignment.

DATED this 10th day of March, 1961.

W.N. Beesley, Sr.

Scott L. Beesley"

The intent of the parties is clearly shown by the above agreements. Acme in substance said:

"We owe you over \$81,000.00 which is past due, but we want to continue to do business with you and obtain further credit. We are willing to work out a security arrangement in order to continue business."

Mastic answers in effect:

"We will continue to do business with you if you will give us a Note for the current balance, secured by a mortgage on our merchandise and all merchandise hereafter acquired from us. This Mortgage is to secure this Note and also the further advances which we make to you by extending credit. The Note is also to be secured by an assignment of your accounts receivable to the extent that they represent our merchandise sold by you to your customers. In addition, two of your principal stockholders owe the company \$21,979.73. We want that debt assigned to us as security for payment of any indebtedness that you may hereafter owe to us."

After the commencement of the law suit, all accounts receivable that were collectable were collected and credit given. The merchandise covered by the chattel mortgage was returned to Respondent by agreement and credit given for the full invoice price less freight. These credits are as follows:

Accounts Receivable Credit.....	\$20,015.42
Merchandise Credit	20,487.50

Thereupon, Respondent moved for Summary Judgment against all appellants. The two individual appellants moved for Summary Judgment in their favor. *At the hearing on the motions of the parties, the amount of credit and the amount due and owing was stipulated to by counsel.*

Since both parties were asking for Summary Judgment, each in effect is saying that there is no material issue of fact and that one party or the other is entitled

to judgment. The case then becomes simply a matter of the proper construction of the written instruments of the parties, which is a matter of law.

The liability of the appellant corporation is admitted and the judgment against it is not subject to question. The real issue is whether the two individual appellants are liable to respondent for the sum of \$21,979.73. Basically, they contend that the assignment on the debt they owe the corporation was for the purpose of securing the note only. Respondent contends, that this assignment was security for any indebtedness the company owed Respondent. This was the construction placed upon the instruments by the lower court and judgment was entered accordingly.

That this is the only possible construction of the agreements between the parties will be shown by the argument set forth below.

ARGUMENT

POINT I.

THE SUMMARY JUDGMENT GRANTED BY THE LOWER COURT WAS CORRECT IN ALL RESPECTS.

Appellants under Point I in their Brief assert first that the credit for merchandise returned was improperly allocated between the Note and open account. They contend that the merchandise credit should have been applied solely to the Note. This is simply a conclusion asserted by Appellants without reasons being given therefor. Appellants do not state that there are facts which will support their conclusion, nor do they point to any agreement of the parties in support of this conclusion.

The Appellants have entirely overlooked and ignored the clear and unequivocal terms of the agreements between the parties. First of all, the agreement in its preamble states,

“WHEREAS, Acme desires to continue as a distributor of products sold by Mastic, and to obtain credit for its further purchases from Mastic.”

The language quoted from the contract clearly demonstrates that the intent of the parties was to embrace a continuation of their business relationship and the further extension of credit.

The mortgage executed by Acme Distributing Company states the following:

“This chattel mortgage is given to secure the payment of a promissory note in the amount of \$81,278.91 made and executed by said mortgagor and payable and delivered to mortgagee at its

office in Long Beach, California, together with any further and additional loans or advances which the mortgagee or holder hereof shall make to the mortgagor."

The mortgage is a standard, open-end mortgage in common and general use throughout the financial world. It covers a situation where two parties contemplate a continuity in business dealings and the further advance of money or goods.

Clearly this mortgage covered not only the Note, but the further advances made by Respondent to Appellant, Acme, represented by the open-account purchases. After the commencement of the law suit, the merchandise was returned and a credit issued for the full invoice price, less freight. This credit is not in dispute and is exactly \$20,487.50 (It is \$163.36 higher than the sum mentioned in Paragraph 7 of Respondent's Affidavit in Support of Summary Judgment, but this figure was agreed upon and stipulated to by counsel before the hearing.) (See Judgment, Record 46.)

Since the mortgage covered both the Note and the open account, this credit should be applied pro-rata as set forth in the Affidavit of Respondent in support of its motion for summary judgment.

In the Utah case of *Farr v. Hartley*, 81 P. 2d 640 (Utah), a series of Notes had been given, secured by a single mortgage on real property. On foreclosure, the question of the application of proceeds had arisen. The court stated and held:

"The only legal inference that can be made

from the Finding of Fact is that the parties agreed that there would be no priority of payment out of the mortgage property in case of foreclosure. Where such an agreement exists, whether express or implied, a mortgagee is entitled to share pro-rata with assignee note holders in the proceeds of the property securing the notes where such proceeds are insufficient to pay the entire amount due."

The only difference in the case at bar and the Farr case, *supra*, is that in the Farr case there were several holders of the several obligations. The principle of law, however, is the same. Where there are several obligations and the proceeds from the mortgaged property are insufficient to pay all, they should be applied pro-rata.

There was due to Respondent on said Note the sum of \$47,250.00 and the sum of \$35,020.69 on open account when the law suit was commenced. These two items bear a 42.3 per cent and 57.7 per cent ratio to the total. Applying this ratio to the \$20,487.50 merchandise credit, there is applied \$11,821.29 to the Note and \$8,666.21 to the open account.

This is a proper accounting of the merchandise credit and the contention of Appellants that the entire credit should be applied to the note is a direct contradiction to the terms of the agreement and chattel mortgage.

Appellants assert that the assignment of the \$21,979.73 debt owed by the individual appellants was for security purposes only and that no consideration was given therefor. We are not enlightened, however, as to

what facts or agreements appellants rely on to prove their assertion.

Here again, the agreements of the parties clearly expressed show that the "contention" of appellants is not legally sound.

First, as to the allegation of the two individual appellants that the assignment was given without consideration. They can be eliminated from this phase of the controversy because they cannot legally raise the issue of want of consideration. In 6 Am. Jur. 2nd Assignments Sec. 90 it is stated :

"The defense that an assignment was made without consideration is not one which the original debtor may raise when sued by the assignee; the assignee may generally recover in an action against the original debtor or obligor even though there was no consideration for the transfer as between the assignor and the assignee."

The individual appellants owe the corporation \$21,979.73. They acknowledge their indebtedness in the instrument of assignment. There is no basis upon which they can complain upon being compelled to pay a debt which they admittedly owe nor can they complain about being compelled to pay it to respondent.

The appellant corporation also "contends" that no consideration was given for the assignment. This contention is also baseless and entirely refuted by the agreements.

The parties expressly made the assignment part of the agreement of March 10, 1961 by reference. The consideration given therefor is the promise of respondent

to grant further credit to Acme on its purchases. This is clearly understood in the agreement. This promise is sufficient consideration. In 10 Am. Jur., Pledge and Collateral Securities, Section 10, it is stated:

“As in the case of contracts generally, the general rule is that a pledge must be supported by a consideration. A sufficient consideration for the pledge of property may consist of a present loan, *a further advancement*, a stipulation, express or implied, of further time in which to pay a pre-existing debt or a change of securities of a pre-existing debt.” (Italics supplied.)

Appellants attack the attorney's fees of \$4,500.00 awarded by the court.

At the conclusion of the argument of counsel on Respondent's motion for summary judgment, the court instructed counsel to see if an agreement could be reached on the amount of attorney's fees to be awarded. Respondent voluntarily reduced its claim for attorney's fees to the sum of \$4,500.00. This figure was incorporated in the judgment to be entered by the court. Before the judgment was entered by the court, it was submitted to counsel for appellants. The judgment contains the following statement:

“The above judgment is approved as to form and amount of attorney's fees.”

This was interlined out by counsel for appellants, and the folowing written in:

“Received a copy of the foregoing proposed judgment and submit the mattter of attorney's fees to the court.”

It is true that Respondent claimed in its Affidavit attorney's fees amounting in all to \$8,200.00. This sum is approximately 10 per cent of the sums due and owing to Respondent at the time the law suit was commenced. Since the mortgage not only covers the note but also covers further advances and provides that the mortgagor shall pay attorney's fees upon foreclosure, the sum originally claimed by Respondent is fair and reasonable.

However, when Respondent submitted the judgment to the Court for entry, it voluntarily reduced this claim to \$4,500.00 and appellants as quoted above submitted the matter of fees to the court for its decision. This is a reasonable fee for the collection of the note alone, without even considering the collection of the further advances (see *Utah State Bar Advisory Handbook on Office Management and Fees*, 1961).

Furthermore, appellants do not contend that the fee is not reasonable. They merely say they do not know how the same was assessed. Inasmuch as the fee is reasonable for the collection of the note alone, the assessment thereof is not material.

Appellants also alleged that by proper application of the credits, the note might be paid and then no attorney's fees could be assessed. In order to make such an assertion, appellants are looking through the wrong end of the barrel. Appellants have announced a novel legal theory for which there is no authority. In 143 ALR, Page 693, it is stated:

"Next to the nature and extent of the work

performed, the most important single factor in determining the amount of an attorney's compensation is the amount of money involved or the value of the property or rights in controversy."

This principle is always viewed from the standpoint of the amount in controversy at the time the law suit is commenced and not after the security has been sold and a deficiency determined. If it were otherwise as appellants contend, the attorney's fees stipulated in notes secured by mortgages would be a nullity and would certainly work a result not intended by the contracting parties.

Appellants have cited in their Brief certain Utah cases where the summary judgment granted by the lower court has been questioned. In each of those cases, the motion was resisted and if the judgment were reversed for trial, this court found that the showing made by the prevailing party in the lower court did not "preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor." *Bullock v. Deseret Dodge Trucking Center, Inc.*, 354 P. 2d 559 (Utah).

This case is distinguishable. Here Respondent and the two individual appellants moved for judgment based on their interpretation of the written instruments executed by the parties. The rule of *Taylor v. Dahl*, 353 P. 2d. 988 (Utah) applies. In that case, "All parties moved for summary judgment based on the pleadings and depositions of the parties. The court, thus,

was invited to construe the alleged contract in light of its terms and the depositions of the parties . . . The trial court, therefore, at the request of all parties was not in error in construing the contract as not having been performed by the seller, and in justifying the refusal of the buyer to go ahead on the contract."

The position of the individual appellants is one of inconsistency. In the trial court, they said in effect that there is no material issue of fact and requested judgment in their favor as a matter of law. When they lose, they reverse their position in this court and state that there is evidence which would support a judgment in their favor and, therefore, the case should be tried on the merits.

Since the individual appellants in the lower court invited the court to construe the written instruments, they should be bound to that position in this court. The scope of inquiry on this appeal is whether the interpretation of the lower court is reasonably justified and not whether appellants can produce evidence which might support a judgment in their favor.

POINT II.

THE PRO-RATED CREDIT IS CORRECT, BUT DOES NOT EFFECT THE JUDGMENT OF THE COURT AND, THEREFORE, IS NOT PREJUDICIAL TO APPELLANTS.

The two individual appellants contend that the merchandise credit should have been applied only to the note balance; that it would then be substantially paid and that since the assignment was security for the note, their individual liability would be considerably reduced.

Respondent pro-rated the merchandise credit, however, simply as a matter of correct accounting procedure, based on the term of the mortgage providing that the merchandise should be security for the note and future advances.

The balance shown by pro-rating the credit are as follows:

	Note Balance	Open-Account Balance
Date of hearing on		
Summary Judgment	\$47,250.00	\$34,238.38
Credit merchandise		
returns—57.7%	11,821.29	8,666.21*
Credit accounts		
receivable collected	20,015.42
Total, less attorney's		
fees and interest.....	\$15,413.29	\$25,572.17
Interest 12/1/62 to		
June 10, 1963	170.00	790.00
Attorney's fees	4,500.00
*(42.3%)		

The assignment, however, was not merely security for the payment of the note, but also security for other indebtedness. This is the construction placed on the

agreements by the lower court and reflected in the judgment of the court. Were it otherwise, judgment against the two individual appellants would have been for the sum of \$20,283.29 instead of \$21,279.73.

Appellants also contend that they had not received credit for the uncollected receivables and that this would make a difference in their liability. Were it the case that the accounts receivable had been given and accepted as payment rather than as security, there would be merit in appellants' contention. Further, Paragraph 9 of the agreement of March 10 is a complete answer to the argument of appellants. It reads :

“9. In the event of default by Acme, Mastic may immediately proceed to collect the assigned accounts receivable of Acme and may as to each and any of such accounts compromise and settle the same without liability to Acme.”

Since the accounts receivable were assigned only as security and the power given to compromise and settle the same, neither of the appellants have the right to complain about some of the accounts being uncollectable or compromised for a lesser amount.

POINT III.

THE ASSIGNED INDEBTEDNESS OF THE INDIVIDUAL APPELLANTS WAS SECURITY FOR THE PAYMENT OF ANY INDEBTEDNESS OWING TO RESPONDENT BY ACME.

As stated above (and by appellants), the real controversy in this case is between Respondent and the two individual Appellants centering upon the assignment. Appellants first of all state that the assignment was for security only. Respondent has never contended otherwise. Secondly, appellants contend that the assignment was security for the payment of the note only. This is the point upon which the parties divide. The assignment was, in fact, security for the payment of any indebtedness owed by Acme to Respondent and the agreements point to no other possible conclusion.

First, the assignment of March 10, 1961, provides that it shall be part of the agreement of March 10, 1961. Nowhere in the agreement is it stated that the assignment is to be additional security for the payment of the note. What is to be security for the payment of the note is set forth quite clearly; a chattel mortgage on goods and an assignment of the trade accounts. Second, the parties did specifically state that their business relationship would continue and that further credit would be given.

The only reasonable inference from these agreements is that the assignment must cover future indebtedness. Such a pledge is legally valid. In *Sheffer v. Griffiths*, 245 P. 698 (Utah), this court states,

"That pledges are to be construed and enforced according to the interest of the parties as gathered from the instrument of pledge and the subject matter thereof, and that by agreement of the parties, the pledge may be applied, not only to secure the payment or performance of a particular liability or obligation, but also in payment or performance of all liabilities and obligations of the pledgor, due, or to become due, existing when the pledge is given or thereafter contracted or acquired."

One further point. The two individual appellants owe the amount of the assigned debt to the corporation. They so state in the written Assignment. The following rule applies:

"As a general rule, the Assignee can recover the same amount from the debtor as the Assignor might have recovered if he had brought suit, and, when the legal title is in the Assignee, he may recover the full amount of the obligation from the debtor, although he holds the chose as security for a debt or on trust for creditors." 6 *C.J.S. Assignments*, Section 100.

If any rights or equity did exist as respects the assignment, they would belong to the Assignor, Acme, and not to the two individual debtors. Here again the two individual appellants had no standing to complain about paying a debt they admittedly owe and since the corporate appellant owes to Respondent a sum in excess of the amount of the assignment, it cannot complain about the application of this debt to its indebtedness to Respondent.

CONCLUSION

On March 10, 1961, Acme owed to Respondent over \$80,000.00 which was past due. Respondent and Acme at that time entered into an agreement providing that Acme would execute a note for the past due amount secured by a chattel mortgage and accounts receivable. In addition, Acme assigned to Respondent a debt owing to it in the amount of \$21,979.73 as security for the further extension of credit that would be granted to Acme as contemplated by the agreement.

Further credit was extended and later Acme defaulted in its payments. Suit was commenced and the security of the goods and accounts receivable realized upon. Motions for summary judgment were made by Respondent and the two individual Appellants. Sums owing and sums paid were stipulated to by counsel. A balance remained that exceeded the assigned debt.

Judgment was entered by the lower court against Acme for the full balance, plus interest and attorney's fees and against the individual appellants for the amount of their debt to Acme and assigned to Respondent as aforesaid.

On appeal, the two individual appellants claim that all credits must be applied to the note and that they are thereby substantially relieved of their liability because the assignment was security for the note only. The agreements do not bear out the interpretation asked by the two appellants and, on the contrary, the only reasonable interpretation of the agreements is that the assignment covered *all* debt owing by Acme.

This correct interpretation was adopted by the lower court and the judgment of that court must therefore be affirmed.

**Respectfully submitted,
HANSON & GARRETT**